15B Fed. Prac. & Proc. Juris. § 3914.18 (2d ed.)

Federal Practice & Procedure | April 2017 Update
Jurisdiction And Related Matters
The Late Charles Alan Wright[a306], Arthur R. Miller[a307], Edward H. Cooper[a308], Vikram David Amar[a309], Richard D. Freer[a310], Helen Hershkoff[a311], Joan E. Steinman[a312], Catherine T. Struve[a313]

Jurisdiction and Related Matters
Chapter 9. Jurisdiction Of The Courts Of Appeals
Edward H. Cooper[a435]

B. Final Judgment Rule

§ 3914.18 Finality—Orders Prior to Trial—Party Joinder

Link to Monthly Supplemental Service

Few problems are encountered in determining the appealability of orders dealing with party joinder. Ordinarily orders granting or denying joinder or substitution are not final. Orders denying intervention have led to some formal difficulty in explaining the nature of the action taken by the court of appeals, but the result is clear—denial of intervention of right is reviewed, and denial of permissive intervention is reviewed for abuse of discretion. These matters are discussed in turn below, along with a brief note on decisions with respect to interpleader.

Whatever the joinder device may be, orders granting [1] or denying [2] joinder are not final. The same rule follows as to orders having similar effects. Thus appeals have been dismissed from orders reinstating a third-party claim, [3] realigning a plaintiff as defendant, [4] vacating an order allowing joinder, [5] or refusing to dismiss newly joined defendants. [6] Dismissal of the action for nonjoinder, on the other hand, is final. [7] Once a party has been joined, dismissal of the action as to that party can be made final under Civil Rule 54(b). [8] One court has taken the apparently reasonable step of accepting an appeal following entry of a Rule 54(b) judgment on an order denying joinder; [9] since the result is the same as allowing joinder and then dismissing, this is a sensible use of Rule 54(b). Some difficulty may be encountered, however, in the language of the rule, which refers to actions involving multiple "parties" and to orders entering judgment as to one or more parties. Review also may be possible as part of the proper scope of an appeal from an interlocutory injunction order, [10] or upon certification for appeal under 28 U.S.C.A. § 1292(b). [11] In extreme circumstances, mandamus also may be available. [12]

Orders with respect to substitution of parties fare the same as orders with respect to joinder. Ordinarily orders granting [13] or denying [14] substitution are not final. It is possible, however, that finality may be found on some expanded principle such as collateral order doctrine or the special rules of finality that apply in bankruptcy proceedings. [15]

Orders granting intervention, or granting intervention but limiting the intervenor's role in the action, are treated in the same way as other orders with respect to party joinder. Although intervention may impose many burdens on the original parties, altering the strategic posture of the case, increasing expense, and aggravating delay, the same is true of other orders granting or requiring joinder. An order granting intervention is not final. [16] Orders granting limited intervention may seem hybrid, since in part they deny unlimited intervention. The Supreme Court, however, has settled the rule that an order granting limited intervention is not final. [17] It has been held that review cannot be had even on cross-appeal, [18]

but this policy should not be followed without exception. If the circumstances of the appeal make it appropriate to review the limits placed on the intervenor, the rules that prohibit an independent appeal should not stand in the way. [19] Appeal also has been denied if the district court simultaneously denies intervention and grants limited intervention, in keeping with the functional view that the result is the same as any other grant of limited intervention. [20] The theory of all these cases is that review on appeal from the final judgment is sufficient. [21] Despite the manifest inability of final judgment review to correct the many costs that may follow inappropriate grants or limits of intervention, this conclusion is in keeping with the basic choices made in adopting the final judgment rule. [22]

Denials of intervention have long been treated differently than other orders with respect to party joinder. [23] No further orders will be entered with respect to the would-be intervenor. To insist that review be delayed until entry of a final judgment concluding the entire action would work to the potential disadvantage of the intervenor and the parties as well, risking duplication of otherwise faultless proceedings to enable participation by the intervenor. Allowing immediate appeal, moreover, need not interfere with the power of the trial court to continue proceedings with the original parties. Recognizing these concerns, courts in fact have provided immediate review. The traditional means of providing review, however, was awkward. Although some courts have come to the view that final judgment appeal is available from orders denying either intervention as a matter of right or permissive intervention, others continue to adhere to one or another of the older views. These matters have been discussed at length in the volume dealing with intervention, [24] and the following summary is shortened accordingly.

Among the contemporary rules on appeal from a denial of intervention, the oldest is the "anomalous" rule recognizing provisional jurisdiction. Under this rule the court of appeals has jurisdiction to reverse if the trial court erroneously denied a petition to intervene as of right, or if denial of permissive intervention was a clear abuse of discretion. If there was not a right to intervene nor any clear abuse of discretion in denying permissive intervention, the appeal was dismissed. [25] The anomalous rule, if enforced according to its express terms, has the same effects as a rule permitting appeal. Dismissal of the appeal apparently has the same effect as affirmance; there is no indication that the dismissal would be denied law-of-the-case effect in subsequent proceedings. The only objection to this rule arises from its vauntedly anomalous character. A court that in fact is doing everything it would do if it admitted to having jurisdiction should acknowledge that it is exercising jurisdiction. Not only is it more seemly to speak directly; accurate characterization may have some impact on such incidental questions as the appeal time question noted in the next paragraph.

Recognizing the odd qualities of provisional jurisdiction, many courts have moved to an intermediate position. Appeal can be taken from denial of intervention as of right, whether or not the district court was right. Appeal can be taken from denial of permissive intervention, however, only if there was a clear abuse of discretion. [26] It would be logical enough to soften this rule further by asserting pendent jurisdiction over the permissive intervention issue on an appeal claiming a right to intervene, [27] although the only effect would be to change the label applied to the decision. A potentially awkward consequence of this intermediate position, however, may arise from the rules governing appeal time. Failure to appeal denial of intervention upon entry of the order may forfeit the right to review by joining with any party who appeals the final judgment, as should be. [28] It is possible, however, to conclude that the right to secure review of a denial of permissive intervention is not forfeited because appeal time did not start to run with the order denying intervention. [29] There is no reason to distinguish between the times for appeal; if anything, it makes more sense to force immediate review of a denial of merely permissive intervention since the interests involved ordinarily are not as pressing as the interests that would support intervention as a matter of right. In any event, the intermediate position simply resolves one half of the provisional jurisdiction oddity; permissive intervention appeals remain subject to dismissal if reversal is—almost inevitably—denied.

Along with the intermediate position are other cases that have decided intervention appeals, either in circumstances that may have presented special reasons for permitting appeal[30] or without bothering to discuss the question of jurisdiction.[31] The Seventh Circuit has clearly adopted the view that all denials of intervention are appealable, and may be joined by others.[32] As suggested above this view is the most sensible. The only persuasive basis for challenge lies in doubt whether denial of permissive intervention should be reviewed at all. If review is to be had, it is better to allow—and indeed to require[32.5]—immediate appeal. Reversal is so unlikely, however, that it might be better to deny any basis of appellate jurisdiction, provisional or otherwise.[33]

A district court's failure to reach final disposition of a motion to intervene does not support an appeal,[33.5] unless perhaps there is such delay in ruling as to be an effective denial of any meaningful participation.

A few incidental questions remain in discussing intervention appeals. If intervention is allowed and the intervenor is thereafter dismissed, appeal is available only if final judgment is entered under Civil Rule 54(b);[34] the intervenor, once allowed to become a party, is treated in the same way as any other party. A bogus attempt to intervene made by a party cannot become an occasion for permitting appeal from an interlocutory order.[35] If intervention is sought after final judgment, on the other hand, a grant or denial clearly is final, on the same principles that make many other post-judgment orders final.[36]

Interpleader procedure is designed to bring multiple claims and multiple parties before the court. The general rules governing interpleader appeals have been set out in an earlier volume[37] and need not be repeated at length here. An order that dismisses an original action in interpleader or that disposes of all claims among all parties is final.[38] Beyond that point, the principles of Civil Rule 54(b) control most matters; disposition of fewer than all the claims as among all the parties is final only upon express entry of judgment in compliance with Rule 54(b),[39] unless proceedings have been so far severed as to create separate actions.[40] Thus an order that merely denies interpleader by way of counterclaim or cross-claim in a pending action is not final, in keeping with the general rules that deny appeal from other orders governing the addition of claims or parties. So too a decision granting interpleader and discharging the stakeholder is not final. And an order refusing to turn over part of the interpleader stake to one of the contending parties is not final.[41] Because interpleader frequently is accompanied by an injunction against related actions, however, review of the propriety of the interpleader itself often is accomplished by interlocutory appeal from the injunction.[42]

Class actions in many ways seem close to the ultimate party joinder device. Because so many questions of appealability arise in the course of administering class actions, they have been set for separate treatment in the next subsection.

Footnotes

a306 Charles Alan Wright Chair in Federal Courts, The University of Texas.
a307 University Professor, New York University. Formerly Bruce Bromley Professor of Law, Harvard University.
a308 Thomas M. Cooley Professor of Law, University of Michigan.
a309 Dean and Iwan Foundation Professor of Law, University of Illinois College of Law.
a310 Robert Howell Hall Professor of Law, Emory University.
a311 Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties, New York University.

a312 Distinguished Professor of Law, Chicago–Kent College of Law, Illinois Institute of Technology.

a313 Professor of Law, University of Pennsylvania.

a435 Thomas M. Cooley Professor of Law, University of Michigan.

1 **Joinder granted**

Orders allowing the addition of new parties plaintiff were interlocutory, and could be reviewed on appeal from an interlocutory injunction order only to determine whether the new parties might be entitled to any equitable relief. Deckert v. Independence Shares Corp., 1940, 61 S.Ct. 229, 234 & n. 4, 311 U.S. 282, 290–291 & n. 4, 85 L.Ed. 189.

In an effort to defeat jurisdiction under the Securities Litigation Uniform Standards Act, the plaintiff filed a fourth amended complaint that substituted 46 named individual plaintiffs for a putative class and also added two defendants. The district court granted leave to amend and remanded to state court. The appeal was dismissed for want of a final judgment. The substitutions could be effectively reviewed in the state courts on remand. Ordinarily orders granting or denying joinder or substitution are not final. W.R. Huff Asset Management Co., L.L.C. v. Kohlberg, Kravis, Roberts & Co., L.P., 566 F.3d 979, 985 n. 7 (11th Cir. 2009), **quoting Wright, Miller & Cooper**.

Grant of leave to amend the complaint in a diversity action to add a state agency as defendant was an unreviewable interlocutory order. Review could not be achieved by relying on the fact that the court erroneously concluded that joinder defeated its jurisdiction and remanded the action to state court; the remand order was shielded from review by 28 U.S.C.A. § 1447(d). Tillman v. CSX Transp., Inc., C.A.5th, 1991, 929 F.2d 1023, 1028–1029, certiorari denied 112 S.Ct. 176, 502 U.S. 859, 116 L.Ed.2d 139.

The portion of the district court order that added a special school district to an ongoing school desegregation suit was not appealable. Liddell v. Board of Educ. of St. Louis, C.A.8th, 1981, 693 F.2d 721, 723 n. 6. See also Liddell v. Board of Educ., C.A.8th, 1982, 677 F.2d 626, 639, certiorari denied 103 S.Ct. 172, 459 U.S. 877, 74 L.Ed.2d 142.

An order joining a new party as an added defendant was interlocutory, and could not be appealed under the collateral order doctrine since it could be fully reviewed on appeal from the final judgment. Prop-Jets, Inc. v. Chandler, C.A.10th, 1978, 575 F.2d 1322, 1325, **citing Wright & Miller.**

An order directing the joinder of additional parties defendant was not final. Metalock Repair Serv. v. Harman, C.A.6th, 1954, 216 F.2d 611.

2 **Denying joinder**

Denial of a motion to dismiss for failure to join a party required under Civil Rule 19 is not final, nor can collateral-order reasoning make it final. Lack of jurisdiction to review the joinder ruling meant that the argument that tribal immunity would defeat joinder also could not be reviewed. Alto v. Black, 738 F.3d 1111, 1130-1131 (9th Cir. 2013).

Not even collateral-order theory supports appeal from an order refusing to order joinder of an added defendant under Rule 19. The question can be decided on appeal from a final judgment. Rule 19 joinder is not a question of subject-matter jurisdiction. Nor could the joinder ruling be reviewed on this appeal from an interlocutory injunction and from denial of the defendant's official-immunity argument. Pendent appeal jurisdiction was inappropriate because the Rule 19 issues were not inextricably intertwined with the injunction or immunity issues. Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1147-1149 (10th Cir. 2011).

An order denying leave to amend the complaint to add new plaintiffs was not final. No attempt had been made to enter judgment under Rule 54(b), nor could a Rule 54(b) judgment be entered on such a nonfinal order. Collateral order doctrine did not support appeal, since review would be possible on appeal from a final judgment. Kahn v. Chase Manhattan Bank, N.A., C.A.2d, 1996, 91 F.3d 385.

An order denying the request of the plaintiff in an adversary proceeding incident to a bankruptcy proceeding to join an additional plaintiff was not final. The order could not be appealed on a theory of practical finality, death knell effects, or collateral order doctrine;

it could be reviewed on appeal from the final judgment. "Orders permitting the addition of plaintiffs are clearly interlocutory. … Similarly, denial of leave to amend pleadings is ordinarily not final." In re Kelly, C.A.3d, 1989, 876 F.2d 14, 15.

Denial of the defendants' motion to amend their pleadings to assert a counterclaim and implead third-party defendants could not be appealed. Collateral order reasoning could not be relied upon to support appeal; although the defendants asserted a fear that trial of the complaint to the judge would establish preclusion barring relitigation of common issues to a jury should the denial of amendment be reversed on appeal, that fear was not sufficient. Mandamus issued to require that the amendment be permitted, however, on finding that the procedures adopted by the district court had improperly prevented the defendants from filing their motion for leave to amend. Richardson Greenshields Securities, Inc. v. Lau, C.A.2d, 1987, 825 F.2d 647.

Appeal cannot be taken from an order that denies a motion to amend the complaint to join a new party defendant. Demelo v. Woolsey Marine Indus., C.A.5th, 1982, 677 F.2d 1030, 1035 n. 12.

An order denying leave to file a third-party complaint was not appealable as a final decision, and could not be made so by reliance on collateral order reasoning. Minnesota v. Pickands Mather & Co., C.A.8th, 1980, 636 F.2d 251.

Denial of a motion to join a new party was interlocutory, not final. A notice of appeal addressed to that order was premature, and was not resurrected by the later entry of final judgment when no subsequent notice of appeal was filed. U.S. v. Taylor, C.A.5th, 1980, 632 F.2d 530.

Denial of a motion to amend the complaint to advance additional claims, and join new defendants, was not appealable. The right sought to be asserted was not separable or collateral so as to fall within the collateral order exception to ordinary finality requirements. Wells v. South Main Bank, C.A.5th, 1976, 532 F.2d 1005, rehearing denied C.A.3d, 1976, 540 F.2d 1087.

Denial of motions by a plaintiff to add a new defendant, and to amend the complaint to substitute the new defendant's name for the "First Doe" defendant named in the complaint was interlocutory and the appeal must be dismissed. Hartford Fire Ins. Co. v. Herrald, C.A.9th, 1970, 434 F.2d 638.

An order denying a motion by the defendant to bring in an added defendant, pursuant to a state procedure analogous to the impleader procedure of present Civil Rule 14, was not final. Van Cott v. Marion De Vries, Inc., C.C.A.2d, 1930, 37 F.2d 48.

Final judgment review

The order denying the motion to join an additional defendant to assert successor liability was interlocutory. "Ordinarily, such an order does not support appellate jurisdiction." But the order was reviewable on an appeal taken after settlement and entry of a final judgment against the original defendant. Brzozowski v. Correctional Physician Servs., Inc., C.A.3d, 2004, 360 F.3d 173, 176–177, **citing Wright, Miller & Cooper.**

3 **Reinstate 3d-party claim**

Collateral order appeal would not be allowed from an order reinstating previously dismissed third-party claims. "The Supreme Court has indicated an intention to cut back on the litigation explosion by restricting" collateral order appeals. In re U.S., C.A.2d, 1984, 733 F.2d 10, 14.

4 **Realign plaintiff**

An order realigning a plaintiff as a defendant could not be appealed as a collateral order, since it could be revised at any stage. Moreover, it was not separate from the merits of the action. School Dist. of Kansas City v. Missouri, C.A.8th, 1979, 592 F.2d 493, 496.

5 **Vacate joinder order**

An order vacating a prior order that permitted joinder of a new defendant was interlocutory and nonappealable. Melancon v. Texaco, Inc., C.A.5th, 1981, 659 F.2d 551, 553, **citing Wright, Miller & Cooper.**

6 **Denying dismissal**

Following an order that granted leave to join additional parties defendant, the new defendants moved to have the case against them dismissed. On appeal from denial of the motion to dismiss, the court noted that "[w]hile this may not be a final order, we consider the question for the guidance of the District Judge on remand. The denial of a motion to dismiss parties is not a final

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.